

FILED  
IN CLERKS OFFICE

AO 242 (Rev. 09/17) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

## UNITED STATES DISTRICT COURT

for the  
DISTRICT OF MASSACHUSETTSU.S. DISTRICT COURT  
DISTRICT OF MASS.

DIEGO C. FIGUEROA

*Petitioner*

v.

Case No.

*(Supplied by Clerk of Court)*

RADM S. SPAULDING (WARDEN)

*Respondent*

(name of warden or authorized person having custody of petitioner)

## PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

## Personal Information

1. (a) Your full name: Diego C. Figueroa  
 (b) Other names you have used: \_\_\_\_\_

2. Place of confinement:  
 (a) Name of institution: Federal Medical Center - Devens  
 (b) Address: P.O. Box 879, Ayer, MA 01432

3. (c) Your identification number: #16412-055  
 3. Are you currently being held on orders by:  
 Federal authorities     State authorities     Other - explain:  
 \_\_\_\_\_

4. Are you currently:  
 A pretrial detainee (waiting for trial on criminal charges)  
 Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime  
 If you are currently serving a sentence, provide:  
 (a) Name and location of court that sentenced you: U.S. District Court For The Western District of New York.  
 (b) Docket number of criminal case: 07- CR - 6219 (CJS)  
 (c) Date of sentencing: September 24, 2008

Being held on an immigration charge  
 Other (explain): Unlawfully being held as a Career Offender under an erroneous interpretation of the Career Offender Guideline that was previously unavailable.

## Decision or Action You Are Challenging

5. What are you challenging in this petition:  
 How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)

Pretrial detention  
 Immigration detention  
 Detainer  
 The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)  
 Disciplinary proceedings  
 Other (explain): \_\_\_\_\_

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## 6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: United States District Court for the Western District of New York.  
 (b) Docket number, case number, or opinion number: 07-CR-6219 (CJS)  
 (c) Decision or action you are challenging (for disciplinary proceedings, specify the penalties imposed):  
Unlawfully sentenced as a career offender by erroneous interpretation of the Guidelines, which resulted in a sentence much greater than the sentence Petitioner would receive otherwise.  
 (d) Date of the decision or action: September 24, 2008.

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## Your Earlier Challenges of the Decision or Action

## 7. First appeal

Did you appeal the decision, file a grievance, or seek an administrative remedy?

Yes       No

## (a) If "Yes," provide:

(1) Name of the authority, agency, or court: U.S. Court Of Appeals for the Second Circuit. 40 Foley Square, New York, New York 10007  
 (2) Date of filing: \_\_\_\_\_  
 (3) Docket number, case number, or opinion number: 08-4914  
 (4) Result: Affirmed  
 (5) Date of result: April 28, 2011.  
 (6) Issues raised: Whether the Government violated it's obligation under Brady v. Maryland; and whether the sentence was substantially unreasonable given Mr. Figueroa's health issues.

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(b) If you answered "No," explain why you did not appeal: \_\_\_\_\_

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## 8. Second appeal

After the first appeal, did you file a second appeal to a higher authority, agency, or court?

Yes       No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Supreme Court of the United States

(2) Date of filing: unknown

(3) Docket number, case number, or opinion number: 11-9188

(4) Result: Certiorari denied

(5) Date of result: April 16, 2012

(6) Issues raised: Unknown

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(b) If you answered "No," explain why you did not file a second appeal:

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9. **Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

Yes  No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Docket number, case number, or opinion number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

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(b) If you answered "No," explain why you did not file a third appeal:

No higher authority  
than the Supreme Court of the United States

10. **Motion under 28 U.S.C. § 2255**

In this petition, are you challenging the validity of your conviction or sentence as imposed?

Yes  No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

Yes  No

If "Yes," provide:

(1) Name of court: United States District Court for the W.D.N.Y.  
 (2) Case number: 12-CV-6398  
 (3) Date of filing: Unknown  
 (4) Result: Denied  
 (5) Date of result: November 16, 2015  
 (6) Issues raised: The sentence was in violation of the Due Process Clause under Johnson v. United States, 135 S. Ct. 780 (2016)

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(b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

Yes  No

If "Yes," provide:

(1) Name of court: U.S. Court of Appeals for the Second Circuit  
 (2) Case number: 19-4070  
 (3) Date of filing: \_\_\_\_\_  
 (4) Result: Denied  
 (5) Date of result: January 6, 2020.  
 (6) Issues raised: Prior convictions no longer qualified for the purposes of career offender. Specifically, the attempted sale of a controlled substance does not qualify as a controlled substance offense under U.S.S.G. §4B1.2.

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(c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence: At the time of sentencing, settled law of this Circuit or the Supreme Court established the legality of the sentence; subsequent to Petitioner's direct appeal and his first §2255, the law changed and should apply retroactively because it is a new guideline interpretation; the Petitioner cannot satisfy the gatekeeping provision of §2255 because the new guideline interpretation is not one of Constitutional law; and due to this change in law the career offender enhancement presents a fundamental miscarriage of law.

#### 11. Appeals of immigration proceedings

Does this case concern immigration proceedings?

Yes  No

If "Yes," provide:

(a) Date you were taken into immigration custody: \_\_\_\_\_  
 (b) Date of the removal or reinstatement order: \_\_\_\_\_  
 (c) Did you file an appeal with the Board of Immigration Appeals?

Yes  No

If "Yes," provide:

(1) Date of filing: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Result: \_\_\_\_\_

(4) Date of result: \_\_\_\_\_

(5) Issues raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(d) Did you appeal the decision to the United States Court of Appeals?

Yes       No

If "Yes," provide:

(1) Name of court: \_\_\_\_\_

(2) Date of filing: \_\_\_\_\_

(3) Case number: \_\_\_\_\_

(4) Result: \_\_\_\_\_

(5) Date of result: \_\_\_\_\_

(6) Issues raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

12. **Other appeals**

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition?

Yes       No

If "Yes," provide:

(a) Kind of petition, motion, or application: \_\_\_\_\_

(b) Name of the authority, agency, or court: \_\_\_\_\_

(c) Date of filing: \_\_\_\_\_

(d) Docket number, case number, or opinion number: \_\_\_\_\_

(e) Result: \_\_\_\_\_

(f) Date of result: \_\_\_\_\_

(g) Issues raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Grounds for Your Challenge in This Petition**

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

**GROUND ONE:** Petitioner No Longer Qualifies as a Career Offender under §4B1.2 because attempted crimes no longer qualify as controlled substance offenses for purposes of the Career Offender Enhancement. See United States v. Havis, 927 F.3d 382 (6th Cir. 2019).

(a) Supporting facts (Be brief. Do not cite cases or law.):

The District Court erroneously counted an attempt to distribute as a controlled substance offense for purposes of the career offender enhancement. Petitioner is actually innocent as a Career Offender.

(b) Did you present Ground One in all appeals that were available to you?

Yes  No

**GROUND TWO:** \_\_\_\_\_

(a) Supporting facts (Be brief. Do not cite cases or law.):

(b) Did you present Ground Two in all appeals that were available to you?

Yes  No

**GROUND THREE:** \_\_\_\_\_

(a) Supporting facts (Be brief. Do not cite cases or law.):

(b) Did you present Ground Three in all appeals that were available to you?

Yes  No

**GROUND FOUR:**

(a) Supporting facts (Be brief. Do not cite cases or law.):

(b) Did you present Ground Four in all appeals that were available to you?

Yes       No

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not: The issue in Ground one was previously unavailable. It is based on a de novo review of the Guidelines conducted by the Sixth Circuit Court of Appeals en banc which clarified that inchoate crimes do not qualify a controlled substance offenses. See U.S. v. Havis, 927 F.3d. 382

**Request for Relief**

15. State exactly what you want the court to do: Petitioner request he be resentenced without the Career Offender enhancement. Alternatively, Petitioner request any relief this Honorable Court may deem appropriate

**Declaration Under Penalty Of Perjury**

If you are incarcerated, on what date did you place this petition in the prison mail system:

3/2/20

I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date: 2-29-20

Diego C Figueroa

*Signature of Petitioner*

*Signature of Attorney or other authorized person, if any*